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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/677,441	10/02/2003	Anne-Marie Stomp	5051-337DVCT3	9042
20792 7590 09/18/2007 MYERS BIGEL SIBLEY & SAJOVEC PO BOX 37428 RALEIGH, NC 27627			EXAMINER ZHENG, LI	
			ART UNIT 1638	PAPER NUMBER
			MAIL DATE 09/18/2007	DELIVERY MODE PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Advisory Action Before the Filing of an Appeal Brief	Application No. 10/677,441	Applicant(s) STOMP ET AL.	
	Examiner Li Zheng	Art Unit 1638	

--The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

THE REPLY FILED 28 August 2007 FAILS TO PLACE THIS APPLICATION IN CONDITION FOR ALLOWANCE.

1. ☐ The reply was filed after a final rejection, but prior to or on the same day as filing a Notice of Appeal. To avoid abandonment of this application, applicant must timely file one of the following replies: (1) an amendment, affidavit, or other evidence, which places the application in condition for allowance; (2) a Notice of Appeal (with appeal fee) in compliance with 37 CFR 41.31; or (3) a Request for Continued Examination (RCE) in compliance with 37 CFR 1.114. The reply must be filed within one of the following time periods:

- a) ☐ The period for reply expires _____ months from the mailing date of the final rejection.
 b) ☐ The period for reply expires on: (1) the mailing date of this Advisory Action, or (2) the date set forth in the final rejection, whichever is later. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of the final rejection.

Examiner Note: If box 1 is checked, check either box (a) or (b). ONLY CHECK BOX (b) WHEN THE FIRST REPLY WAS FILED WITHIN TWO MONTHS OF THE FINAL REJECTION. See MPEP 706.07(f).

Extensions of time may be obtained under 37 CFR 1.136(a). The date on which the petition under 37 CFR 1.136(a) and the appropriate extension fee have been filed is the date for purposes of determining the period of extension and the corresponding amount of the fee. The appropriate extension fee under 37 CFR 1.17(a) is calculated from: (1) the expiration date of the shortened statutory period for reply originally set in the final Office action; or (2) as set forth in (b) above, if checked. Any reply received by the Office later than three months after the mailing date of the final rejection, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

NOTICE OF APPEAL

2. ☒ The Notice of Appeal was filed on 28 August 2007. A brief in compliance with 37 CFR 41.37 must be filed within two months of the date of filing the Notice of Appeal (37 CFR 41.37(a)), or any extension thereof (37 CFR 41.37(e)), to avoid dismissal of the appeal. Since a Notice of Appeal has been filed, any reply must be filed within the time period set forth in 37 CFR 41.37(a).

AMENDMENTS

3. ☐ The proposed amendment(s) filed after a final rejection, but prior to the date of filing a brief, will not be entered because
 (a) ☐ They raise new issues that would require further consideration and/or search (see NOTE below);
 (b) ☐ They raise the issue of new matter (see NOTE below);
 (c) ☐ They are not deemed to place the application in better form for appeal by materially reducing or simplifying the issues for appeal; and/or
 (d) ☐ They present additional claims without canceling a corresponding number of finally rejected claims.

NOTE: _____. (See 37 CFR 1.116 and 41.33(a)).


4. ☐ The amendments are not in compliance with 37 CFR 1.121. See attached Notice of Non-Compliant Amendment (PTOL-324).
 5. ☐ Applicant's reply has overcome the following rejection(s): _____.
 6. ☐ Newly proposed or amended claim(s) _____ would be allowable if submitted in a separate, timely filed amendment canceling the non-allowable claim(s).
 7. ☐ For purposes of appeal, the proposed amendment(s): a) ☐ will not be entered, or b) ☐ will be entered and an explanation of how the new or amended claims would be rejected is provided below or appended.
 The status of the claim(s) is (or will be) as follows:
 Claim(s) allowed: _____.
 Claim(s) objected to: _____.
 Claim(s) rejected: _____.
 Claim(s) withdrawn from consideration: _____.

AFFIDAVIT OR OTHER EVIDENCE

8. ☐ The affidavit or other evidence filed after a final action, but before or on the date of filing a Notice of Appeal will not be entered because applicant failed to provide a showing of good and sufficient reasons why the affidavit or other evidence is necessary and was not earlier presented. See 37 CFR 1.116(e).
 9. ☐ The affidavit or other evidence filed after the date of filing a Notice of Appeal, but prior to the date of filing a brief, will not be entered because the affidavit or other evidence failed to overcome all rejections under appeal and/or appellant fails to provide a showing of good and sufficient reasons why it is necessary and was not earlier presented. See 37 CFR 41.33(d)(1).
 10. ☐ The affidavit or other evidence is entered. An explanation of the status of the claims after entry is below or attached.

REQUEST FOR RECONSIDERATION/OTHER

11. ☒ The request for reconsideration has been considered but does NOT place the application in condition for allowance because:
See Continuation Sheet.
 12. ☐ Note the attached Information Disclosure Statement(s). (PTO/SB/08) Paper No(s). _____.
 13. ☐ Other: _____.


ASHWIN D. MEHTA, PH.D.
PRIMARY EXAMINER

Continuation of 11. does NOT place the application in condition for allowance because: Claims 1-10, 12-31, 33-40 remain rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claims 1, 22-25 of U.S. Patent No. 6,815,184, for the reasons of record stated in the Office action mailed July 28, 2006 and February 28, 2007. In addition, claims 11 and 32 remain rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claim 1 of U.S. Patent No. 6,815,184 in view of Dieryck et al., for the reasons of record stated in the Office action mailed July 28, 2006 and February 28, 2007. Applicants traverse in the paper filed August 28, 2007. Applicants' arguments have been fully considered but were not found persuasive.

1) Applicants argue that The MPEP is clear that the reason for a double patenting rejection is to prevent the unjustified timewise extension of the right to exclude granted by a patent (response, page 8, 2nd paragraph) and that the extension of patent term is not an issue (response, 2nd paragraph from the bottom of page 8). However, Applicants narrowly interpret the purpose for a double patenting rejection. MPEP clearly states that "The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the "right to exclude" granted by a patent and to prevent possible harassment by multiple assignees" (see MPEP Form Paragraph 8.33). Therefore preventing the unjustified timewise extension time is not the sole purpose.

2) Applicants further argue that the present application has an earlier effective filing date and patent '184 is not prior art for the purpose of double patenting under 35 U.S.C. 102 or 103 (paragraph bridging pages 9-10). However, the Examiner does not make a rejection under 35 U.S.C. 102 or 103. Further, Applicants are reminded that double patenting rejection and prior art rejection are separate issue.

3) Applicants further argue that the CREATE Act Safe-Harbor Provisions do not apply to the present application (response, 3rd paragraph of page 10). However, the examiner does not make rejection on that basis.

4) Applicants further argue that both MPEP § 804.03 (IV) and ChartIIB in § 804 indicates that a double patenting rejection is appropriate when the reference application or patent is prior art against the patent application at issue. Applicants further emphasize that the term "AND" noted in ChartIIB is clearly intentional, which supports that the rejections as outlined in ChartIIB cannot be made if '184 patent does not qualify as prior art (response, paragraph bridging pages 13-14). The Examiner does not agree with Applicants' interpretation of the MPEP. It is clear cited in MPEP § 804 section III, 6th paragraph that "An examiner should make both a 35 U.S.C. 102(e)/103 rejection and a double patenting rejection over the same reference when the facts support both rejections." Therefore, that the patent at issue is a prior art is not a prerequisite for making a double patent rejection.

5) The provisional rejection of claims 1-10, 12-31, 33-40 on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claims 1 and 22-25 of copending Application No. 10/873,846 is withdrawn due to abandonment of the Application No. 10/873,846. However, instant claims 1-10, 12-31, 33-40 are provisional rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over the new application 11/778,480, which is a continuation of Application '846.